

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
3 AT HUNTINGTON

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6 TRANSCRIPT OF PROCEEDINGS
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10 IN RE: ETHICON, INC., PELVIC REPAIR MDL NO.
11 SYSTEM PRODUCTS LIABILITY LITIGATION 2:12-MD-2327
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14 THIS DOCUMENT RELATES TO:
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16 MEDENNA K. DORGAN vs. CASE NO.
17 ETHICON, INC., ET AL. 2:12-cv-03159
18
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20 TASHA MOBLEY vs. CASE NO.
21 ETHICON, INC., ET AL., 2:15-cv-14159
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25 TELEPHONIC MOTIONS HEARING
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28 September 19, 2019
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31 **BEFORE THE HONORABLE CHERYL A. EIFERT**
32 **UNITED STATES MAGISTRATE JUDGE**
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PROCEEDINGS

JUDICIAL ASSISTANT: Hello, everyone. This is
Laura, Judge Eifert's Judicial Assistant.

I would first like to confirm our court reporter today,
Lisa Cook, is on the line.

COURT REPORTER: Hi, Laura. Yes, I'm here.

JUDICIAL ASSISTANT: Hi. Thank you, Lisa.

We are here in the case of *Dorgan* vs. *Ethicon*,
2:12-cv-3159, and *Mobley* vs. *Ethicon*, 2:15-cv-14159.

This is a counsel-requested telephone conference regarding depositions of sales representatives and other Ethicon former and current employees.

All right. May I have plaintiffs' counsel, please?

MR. KUNTZ: Jeff Kuntz on behalf of plaintiffs.

JUDICIAL ASSISTANT: Thank you.

MS. BAGGETT: Renee Baggett also on behalf of plaintiffs.

JUDICIAL ASSISTANT: Thank you.

May I have counsel for Ethicon, please?

MS. MODAK-TRURAN: Anita Modak-Truran on behalf of Ethicon.

JUDICIAL ASSISTANT: All right. Thank you.

And I just heard someone ring in, if you wouldn't mind
to identify yourself.

MR. ASARO: Yes. This is Joe Asaro on behalf of

1 Ethicon.

2 JUDICIAL ASSISTANT: All right. Thank you.

3 All right. If that's everyone, please hold one moment
4 for Judge Eifert. And I'll just remind you to please
5 identify yourself when speaking.

6 (Pause)

7 THE COURT: Good afternoon.

8 MS. MODAK-TRURAN: Good afternoon, Your Honor.

9 MR. KUNTZ: Good afternoon, Your Honor.

10 THE COURT: How are you all? I appreciate you
11 getting together here so quickly so we could get this
12 resolved.

13 It looks to me as though there's no dispute anymore
14 over the number of sales reps that can be deposed in each
15 case. Is that right?

16 MR. KUNTZ: That's correct, Your Honor. This is
17 Jeff Kuntz for plaintiffs. That's correct, Your Honor.

18 THE COURT: All right. So really the only thing
19 we're left with -- and I know there was an issue about two
20 depositions that were scheduled. But the dates for those
21 have already passed, so I assume that that was somehow
22 resolved. Is that correct?

23 MS. MODAK-TRURAN: Your Honor, this is Anita
24 Modak-Truran. And, yes, that's correct.

25 THE COURT: All right. So all we are left to

1 discuss today, then, would be depositions of the division
2 managers or regional business directors. Is that right?

3 MS. MODAK-TRURAN: Yes, Your Honor. This is Anita
4 Modak-Truran. That is correct.

5 THE COURT: All right. Who wants to speak on
6 behalf of the plaintiff?

7 MR. KUNTZ: This is Jeff Kuntz. I'll speak on
8 behalf of the plaintiff.

9 Your Honor, if we could move back to the sales reps
10 real quick for one second which is kind of one side issue.

11 I agree we're limited to one, but we, we now have this
12 issue where, where we've requested sales reps dates and then
13 we get, as you can see in some of the papers, the response
14 from Ethicon of, "Well, we don't know if we represent them.
15 We'll let you know." And then we -- you know, we're running
16 out of time here.

17 So we subpoena them and then they say, "Oh, now we do
18 represent them or maybe we don't and we'll have to get a new
19 date."

20 And I just don't want to have to come back to you or --
21 you know, some of these dates, when we get a valid subpoena
22 on these people, we're going to have to keep them regardless
23 of whether the sales rep may or may not be able to do it
24 that day because we're running out of time.

25 We've had to track some of them down because Ethicon

1 doesn't have control over them. And I just kind of want to
2 put that out there before, you know, having to request
3 another phone call 10 days from now over somebody we've got
4 a valid subpoena on that we have to keep that date if that
5 makes sense.

6 THE COURT: Yes.

7 Do you have anything you want to say in response to
8 that, Ms. Modak-Truran?

9 MS. MODAK-TRURAN: I do.

10 Your Honor, this is a very challenging process with the
11 number of requests that we've had. And just to give you
12 some background, we're about seven years or so since the
13 first wave. Seventy-five percent of the sales force is no
14 longer with the company. Twenty-five percent is with
15 Ethicon or a division of J&J.

16 For those that are within the company, we are able to
17 secure dates. Where there's a challenge, as Mr. Kuntz was
18 talking about, is what happens if they are no longer with
19 the company.

20 So what we do, as soon as plaintiffs' counsel -- and
21 Joe Asaro is on the line and he personally takes care of
22 this. What he does is we try to reach out and try to find
23 the person. We try to get that no-longer-an-employee to see
24 if they will agree to appear without a subpoena. Sometimes
25 they do. Sometimes they don't. We try to provide dates to

1 the plaintiffs' counsel that will work for everyone.

2 We've had situations where, you know, a sales rep is no
3 longer with the company who's agreed to appear and won't
4 provide us dates. And in that case, Mr. Asaro will tell
5 plaintiffs' counsel that.

6 So we have made a lot of progress. I'm going to let
7 Joe give you a little bit more detail on what he's done. To
8 date, we've taken -- there have been seven sales reps taken
9 in the Wagstaff cases. There are 11 scheduled.

10 There's one sales rep, Ona Bernal, that they would like
11 to take who unfortunately has a condition where he's not
12 testified because of his mental status.

13 And then we have another one where the sales rep agreed
14 to attend a deposition -- a former sales rep agreed to
15 attend a deposition but has not given Mr. Asaro dates.

16 We do work -- I'll let Mr. Asaro follow up on this.

17 MR. ASARO: Hi. Yeah, this is Joe Asaro.

18 The only thing I would add is, you know, I think
19 that -- I was actually surprised by Mr. Kuntz's letter to
20 hear that he thought there had been any issues with
21 scheduling the depositions as far as I was concerned because
22 the plaintiffs had requested sales reps and we had gotten
23 them dates.

24 We -- you know, I haven't worked directly with
25 Mr. Kuntz. I've worked with 12 or 14 other lawyers at his

1 firm and we haven't had any problems as far as I know.

2 Maybe there were one or two where there were issues
3 that Anita just mentioned. But for the most part, we were
4 able to get them scheduled.

5 You know, we track down the sales rep. We ask them if
6 they want to be -- if they're willing to appear without a
7 deposition -- I mean without a subpoena. Frankly, I'm
8 shocked that any of them agree to that, but, but they do.

9 And in those cases, we were able to quickly schedule
10 dates for their depositions with no issues at all. And for
11 those that say, "No, I'll only appear if they serve me with
12 a subpoena," then, then we give the information to the
13 plaintiffs and that's what they do.

14 And in that case, once they get served, the sales reps
15 typically call us and say, "Okay, now I've been served. I'd
16 like you to represent us -- represent me in this deposition.
17 And the date that's on this notice doesn't work for me.
18 What can we do?"

19 And, so, obviously we reach out to plaintiffs and we
20 try and come out -- come up with a date that works for
21 everybody. I don't really -- I don't know that there's
22 anything that about process that could go anymore smoothly
23 than it has.

24 MR. KUNTZ: Well, this is Jeff Kuntz. We -- this
25 is Jeff Kuntz.

1 We still have 14 unscheduled. Some of those people are
2 under subpoenas. And then it's, "Well, we'll get back.
3 They can't do those dates."

4 And I guess what I'm saying is, look, we're not living
5 in a perfect world. I get it's hard. But Judge Goodwin has
6 put tight deadlines on us and there's just going to be
7 instances where we're going to subpoena people because we
8 don't give dates or you don't know whether you represent
9 them.

10 And I'm just putting that out in front of you, Judge
11 Eifert, to say they're -- you know, a valid subpoena is a
12 valid subpoena. We've worked well, both sides, for seven
13 years, but we're just kind of in this imperfect situation.

14 And I don't want to be back here where we're saying we
15 have to do that date because we're out of time and, sorry,
16 defendant lawyers' schedule, sorry, sales reps' schedule,
17 but you're under a valid subpoena and we've got to stick to
18 it.

19 That's just my concern because we're, we're running out
20 of time and we have 14 left to schedule.

21 THE COURT: Right. Well, you know, let me say
22 what's always my -- my view on this has always been this. I
23 think the first step is for the lawyers to try to work
24 together, get convenient dates.

25 But if the lawyer who wants the deposition has waited

1 for a week or so and not gotten any dates and feels it
2 necessary to issue a subpoena and have it served on the
3 witness, then that's what the attorney has to do.

4 And then if -- I mean, there can still be discussions
5 after that to see if there's a way to accommodate the
6 witness. But if the witness is under a subpoena and there
7 isn't some extraordinary circumstance that prevents the
8 witness from being there, the witness needs to be there.

9 So I guess in a roundabout way what I'm saying is you
10 should try to work together. But it's still -- the attorney
11 representing the client who wants the deposition still has a
12 primary responsibility to that client to get the deposition
13 completed in time.

14 If that means they have to issue a subpoena, then
15 that's the way it has to be. And there's just no way around
16 that. You know, I, I encourage you to work together, but I
17 understand what Mr. Kuntz is saying. And I think he has to
18 do what he feels is in the best interest of his client.

19 So I'm just going to leave it at that. I, I don't want
20 that subpoena to be used as a sword. But, at the same time,
21 it's a tool that's available and sometimes it has to be
22 used. And there's just no way around that.

23 So I just encourage you to work together but, you know,
24 you have to do -- at the end of the day, Mr. Kuntz, you have
25 to do what you feel you need to do.

1 MR. KUNTZ: Right. And I appreciate that and we
2 will get on the phone and try and reconcile these lists and
3 see where we're at, and we won't use it unless we have to.
4 So I appreciate it. That helps.

5 THE COURT: Okay. So let's talk now about the
6 division managers and the regional business directors. Who
7 wants to speak on that on behalf of the plaintiff?

8 MR. KUNTZ: I will, Your Honor. This is Jeff
9 Kuntz again.

10 THE COURT: Okay. Go ahead.

11 MR. KUNTZ: Your Honor, these are -- you know, I
12 know Ethicon has tried to couch them as, as true, you know,
13 corporate witnesses and, and tie it to that discovery that
14 we did years and years ago in the MDL with scientists and
15 doctors and engineers, but they really are -- I mean,
16 they're case specific type witnesses that have a lot of
17 knowledge and contact with the treating physicians who have
18 put these products, you know, into these, into these ladies.

19 They market to those physicians. They give information
20 to those physicians. And we think we're entitled to, to
21 take one of their depositions. Again, the defendant fact
22 sheets list several of them.

23 You know, there was some insinuation that this is just
24 harassment or done for other purposes. We're not asking for
25 five in each case. I mean, it's -- you know, if we wanted

1 to, you know, create harassment issues, we'd ask for all
2 their depositions. We're talking about one person.

3 And, again, understand that these depositions take a
4 lot of time and money on our part. I mean, to go out, get
5 this witness, send a lawyer there, set up a videographer, I
6 mean, we're spending, you know, at least \$5,000 a
7 deposition. So we're not just doing this to do it. They
8 have knowledge.

9 Interestingly -- and I don't have the transcript yet,
10 but I will send it when I get it. The very first sales rep
11 depo that we did in Wave 12 in the *Debra Moe* case, the sales
12 rep deferred to the divisional manager at least six times in
13 her deposition and said she couldn't answer questions about
14 documents that her name was on; that we would have to ask
15 the division manager.

16 And there's situations like, like that. It's kind of
17 one of these things we don't know what we don't know until
18 we don't know it. And I think we're entitled to take these
19 people's depositions and figure out the contact they had
20 with the doctors.

21 They market to key opinion leaders. They market to the
22 implanters. One of the big failure-to-warn defenses by
23 Ethicon in this case is -- it changed in 2015 when the
24 Canadian regulatory authorities made them update their
25 label. It used to be, oh, our IFUs contain everything that

1 they need. The exacts words aren't in there, but it's in
2 there to -- now everybody knew all this stuff. We didn't
3 have to put it in there. Everybody knew it.

4 And I think we're entitled to ask the division managers
5 what risks and complications they knew about the products,
6 what were they telling doctors, what was going on at the
7 time. And these are people that have very relevant, case
8 specific information.

9 And as I've said in the papers, there's no limit -- the
10 PTO is silent on it. There's no limit on family member
11 depositions they can take on our side of things. In fact,
12 in three or four cases already we've gotten requests for
13 four or five additional family member depositions beyond,
14 beyond the plaintiff and her husband.

15 And, you know, we're asking to take two case specific
16 depos on their end, the sales rep and the divisional
17 regional manager. And I -- you know, I don't think that is
18 burdensome. I don't think it's outrageous on our part.

19 And the last thing I'll say is, you know, this. You
20 didn't do it in the past, so you shouldn't be allowed to do
21 it now. Well, the context of this litigation has changed.
22 The cases in these waves have changed.

23 These are ladies who are pretty adamant -- you know,
24 look, some of these cases are better than others. But
25 they're adamant about not taking their amount.

1 And, so, the likelihood of these cases, you know,
2 moving down the line and getting tried is a lot higher, you
3 know, than any other, you know, previous waves where, you
4 know, frankly, we're thinking these are probably all going
5 to settle, so do I want to spend the time and money doing
6 all sales reps. I, I didn't back then. You know, it's a
7 strategy. But now we're staring at cases of a very high
8 probability of these getting remanded and trial set.

9 So that's all I have on the issue.

10 THE COURT: All right.

11 Who wants to speak then on behalf of the defendant?

12 Ms. Modak-Truran?

13 MS. MODAK-TRURAN: Yes, Your Honor. I will speak
14 on behalf of the defendant.

15 THE COURT: All right.

16 MS. MODAK-TRURAN: I think where there is a
17 disconnect with plaintiffs' position and our position
18 concerning regional business directors and division managers
19 is whether or not they're actually case specific.

20 So the role -- and we've put this in our letter
21 response. The role of the division manager is to manage and
22 supervise sales reps. They do not detail products to
23 implanters. And that's why we've never objected to,
24 obviously, sales rep depositions because that is the person
25 who goes directly to an implant.

1 One step further removed from a division manager is the
2 regional business director who is the supervisor of division
3 managers. And, so, a regional business director has no
4 contact with the implanters. It's not part of their job.

5 I will say that what Mr. Kuntz is asking for, the
6 information about, you know, what type of marketing, was
7 there professional education, those people have been
8 produced for deposition.

9 And Mr. Farrell and I went through to see what we have.
10 And we've had 15 company witnesses that have been deposed on
11 sales and marketing, sales training, sales learning
12 administration, marketing alone, professional ed, and
13 professional education course and design. And just for the
14 record, those witnesses are:

15 Dharini Amin, Laura Angeline, Giselle Binet, Allison
16 London Brown, Lynn Hall, Matt Henderson, Stacey Hoffman,
17 Scott Jones, Erika Lane, Brian Luscombe, Jonathan Meek, Paul
18 Parisi, Bart Pattyson, Rhonda Peele, Price St. Hilaire.

19 These witnesses collectively gave over 41 days of
20 deposition testimony, which is over 280 hours, on these
21 various topics of professional education, sales training,
22 and marketing.

23 The division managers and regional business directors
24 don't do that. They're not related to case specific. And
25 what we've told Mr. Kuntz is if they can show us that there

1 is a case specific connection, then we will certainly
2 consider that request. And let me give you one example.

3 In the list of division managers and regional business
4 directors that they want to depose, they identified Marcus
5 Oldlehr. This is in the *Fromm-Foster* case. And
6 Mr. Oldlehr is a district manager.

7 And at the deposition of the implanter, the implanter
8 said that he had conversations with Mr. Oldlehr. We're not
9 sure if that was in the context of him being a sales rep or
10 of him being a district manager. But that deposition is
11 scheduled because we did see a case -- they were able to
12 show us a case specific connection.

13 But, Your Honor, to allow plaintiffs to take --
14 remember, most of these people are no longer with the
15 company. To allow them to take these business directors --
16 regional business directors and division managers without a
17 case specific component, I'm not sure how it's relevant. I,
18 I don't see the relevance.

19 And it is incredibly burdensome on third parties who
20 many of them are no longer with the company. And I don't
21 think that plaintiffs' counsel established good cause to
22 take those depositions.

23 THE COURT: All right. Let me say this on this
24 topic.

25 I went back and I did look at Pre-Trial Order Number 33

1 which was the order that sort of got these case specific
2 depositions started.

3 And it's clear from that order that Judge Goodwin was
4 not allowing the plaintiffs to take depositions of division
5 managers and regional business directors. He, he felt that
6 the plaintiffs could take depositions of sales reps, but he
7 didn't go higher up in the chain of hierarchy for the case
8 specific depositions.

9 Now, it's also true at that point only one additional
10 fact witness was allowed to be deposed in addition to the
11 plaintiffs. So, obviously, there's been a shift with that
12 since now family and friends can be deposed.

13 But even still, I think the point of it was that we
14 don't want a lot of cumulative depositions. And the real
15 overarching issue should have already been fully deposed --
16 fully explored and discovered and the witnesses fully
17 deposed.

18 So I'm not seeing any need to say from a blanket
19 standpoint that there should be depositions of all these
20 division managers and regional business directors. I feel
21 that they would not be as case specific as the plaintiff is
22 representing them to be in each case.

23 Now, there may be a case here or there such as the one
24 that Ms. Modak-Truran just mentioned where there has been
25 testimony that does make a division manager or district

1 manager important to the case.

2 And, so, I think the defendants are being entirely
3 reasonable to say if you can show me something about that
4 witness in this particular case that makes that witness's
5 testimony not cumulative, then we're certainly willing to
6 consider making that person available and doing what we need
7 to do to get that person.

8 And I think that's really what the intent of all of
9 these orders have been is it's not -- we're not at the point
10 in any of these litigations where we're broadening the scope
11 of discovery. What we're doing is severely restricting the
12 scope of discovery because we're at the tail end of these
13 now and these need to be finished and they need to move on.

14 So what I'm going to say about that is if, Mr. Kuntz,
15 you've got testimony or you've got some reason why you think
16 in a particular case a division manager or a regional
17 business director would have relevant, noncumulative
18 testimony, then I think you should make the request to
19 Ms. Modak-Truran to get that person -- have that person
20 available. And, you know, if she refuses to do it and you
21 feel that you need to bring that to me, then bring it to me
22 on a case by case basis.

23 But I'm not going to -- and I don't think that the plan
24 of Judge Goodwin is to have you just take division managers'
25 depositions and regional business director depositions in

1 every one of these cases. I think just the opposite is true
2 to be honest with you.

3 So that's what I would say is that I will find if, if
4 you want to depose one of these people and you have a good,
5 a good factual basis to do that, then you should be allowed
6 to do that.

7 On the flip side, if you don't have that, then I'm
8 going to -- should Ethicon make a motion for protective
9 order, I would grant that motion for protective order.

10 Does that make sense to everyone?

11 MR. KUNTZ: Yes.

12 MS. MODAK-TRURAN: Yes, Your Honor.

13 THE COURT: Okay. So I would again suggest that
14 you work with each other. I think that your group has been
15 very, very collegial during the entire seven years that this
16 MDL has been going on and have had very few problems, very
17 few worries. It seems like you do work most things out.
18 And when you do come to me, you have a legitimate reason for
19 that.

20 So I'm -- I feel confident that you'll be able to work
21 these issues out as they come up.

22 When is your discovery deadline by the way?

23 MR. KUNTZ: October 25th.

24 MS. MODAK-TRURAN: October 25th.

25 THE COURT: Okay. So I guess, Mr. Kuntz, you need

1 to get to work and really see if there's anyone you're aware
2 of right now in those two categories that you have a factual
3 basis for requesting that deposition and get those names.

4 MR. KUNTZ: Right. Yeah, I will. I mean, like
5 I'm -- just while we have you, I mean, the one that I
6 brought up when I was talking earlier is, again, in the *Moe*
7 case. And this is where the sales rep five times the
8 document she's on about bonuses she gets says, "I can't
9 answer that question. You have to ask the division manager.
10 You have to ask the division manager." I mean, that's one
11 where I think I would say we need to talk to them.

12 THE COURT: Well, I --

13 MR. KUNTZ: You know, I --

14 THE COURT: I agree. If you're taking depositions
15 and the witnesses are deferring to other people, then for
16 the limited scope of, of the questions that have been
17 deferred you ought to be able to depose them on who's going
18 to answer your question. I really don't understand why a
19 sales rep would not be able to answer those questions.

20 So, Ms. Modak-Truran, I would suggest to you that you
21 perhaps, you know, talk to your witnesses and explain to
22 them that if they don't answer the questions and they defer
23 it to someone else, that means somebody else is going to
24 have to testify.

25 So they ought to really give it some thought and figure

1 out whether they can actually provide an answer or not. I
2 don't want them to guess or anything but if, you know,
3 you're asking somebody how they got bonuses -- I mean, I --
4 from the time I was 14 and babysitting, I knew where my
5 money was coming from and why I was getting it. So I find
6 it hard to believe that people don't understand, you know,
7 how they -- or why they would get a bonus. And I'm just
8 using that as an example.

9 So, anyway, yes, I think in situations like that if
10 you've got, you've got issues or you've got questions on
11 issues that are important and these people can't answer
12 them, and it's not just because they can't remember, it's
13 because they don't know how something actually worked, then
14 I would say that would be the kind of situation where you
15 would have the right to at least take a limited deposition
16 of someone who can answer your questions.

17 MR. KUNTZ: Okay. Thank you.

18 THE COURT: All right. Thank you all. I assume
19 there's nothing else. Is that right?

20 MS. MODAK-TRURAN: That's right, Your Honor.

21 And for Lisa we would like to order a copy of the
22 transcript.

23 COURT REPORTER: Okay. Thank you.

24 THE COURT: And, Lisa, thank you. I appreciate
25 it.

1 COURT REPORTER: You're very welcome.

2 THE COURT: Court is in recess.

3 (Proceedings concluded at 1:57 p.m.)

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10 I, Lisa A. Cook, Official Reporter of the United
11 States District Court for the Southern District of West
12 Virginia, do hereby certify that the foregoing is a true and
13 correct transcript, to the best of my ability, from the
14 record of proceedings in the above-entitled matter.

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s\Lisa A. Cook

September 23, 2019

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Reporter

Date

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